(2) Judgment for the applicant against the respondent in the sum of $10,726/– being the difference between the value of the consideration paid by the respondent and the fair market value of the subject land at the time of the conveyance of the subject land.

(3) Costs of and incidental to this motion be paid by the respondent to the applicant. In the absence of an agreement, such costs to be taxed.

Order accordingly.

Solicitors: *Charles Ling.*

TAN CHENG HOCK v. CHAN THEAN SOO & ANOR.

[O.C.J. (Edgar Joseph Jr. J.) July 29, 1985 & February 13, 1986]

[Penang – Civil Suit No. 248 of 1967]

Land Law – Disputed property paid for with plaintiff's cheque but registered in defendants' name – Claim by plaintiff – Refusal to transfer by defendants – Defendants claim cash in exchange for plaintiff's cheque – Credibility of witnesses – Demeanour not to be relied on solely – Balance against rest of the evidence and probabilities of case – Whether declarations for plaintiff should be granted.

Evidence – Credibility of witnesses – Demeanour not to be relied on solely – Balance against rest of evidence and probabilities of case.

The plaintiff was a recently retired businessman aged 76. The first defendant, aged 62, was a security officer at Bayan Lepas but at all material times to this suit he was a clerk attached to the Vehicle Department of Penang Municipality and in receipt of a salary of $193 per month. He claimed to have retired from the Municipality but later admitted he was dismissed for misappropriation of funds. He was convicted and sentenced to imprisonment for one week. The second defendant is a housewife and the wife of the first defendant. The parties were on very close terms until the dispute concerning the ownership of a dwelling house ("the disputed property") in Penang erupted into a legal battle. The first defendant applied to and was allocated the disputed property by the Municipality. In his application, he proposed to pay for the disputed property by instalments but in fact he paid for it by a single lump sum of $9,900 by a cheque drawn out by the plaintiff in favour of the defendants, who registered the disputed property in their names in 1956, but its title deed was handed to the plaintiff several months after purchase and remained with him until production in court. The plaintiff received no rent from the defendants, who paid the rates and outgoing.

When the defendants flatly refused to transfer the disputed property to the plaintiff, he commenced these proceedings seeking declarations and consequential orders in his favour. Each side had accused the other of lying and deceit. The decision depended on the credibility of the parties and their witnesses. The crucial question was: Why did the plaintiff issue the cheque for $9,900 in favour of the defendants. The plaintiff contended that the defendants had no money to pay for the disputed property and suggested he buy it and he agreed. The defendants' case was that they exchanged cash for the plaintiff's cheque.

Held: (1) in arriving at his finding as to credibility, the learned trial judge did not rely solely on demeanour for that had to be balanced against the rest of the evidence and the probabilities of the case;

(2) the plaintiff was entitled to the declarations prayed for in the statement of claim with usual consequential orders and costs;

(3) the counterclaim was in consequence dismissed.

Cases referred to:

(1) *Powell & Wife* v. *Streatham Manor Nursing Home* [1935] A.C. 243, 267.

(2) *Wiedemann* v. *Walpole* [1891] 2 Q.B. 534, 537.

CIVIL SUIT.

Darshan Singh for the plaintiff.

Ranjit Singh for the defendants.

Cur. Adv. Vult.

Edgar Joseph Jr. J.: This case is about three relatives who, although at one time, on very close terms, have fallen out, so much so, that their quarrel has erupted into a long drawn out and bitter legal battle about the ownership of a dwelling house ("the disputed property"). Each side has accused the other of lying. Allegations of deception and deceit have been freely made. As a trier of fact, it will be my task to determine where the truth lies.

A review of the circumstances of this case, which I shall presently undertake, will make it clear beyond argument, that my decision must depend upon the credibility of the parties and that my assessment of their credibility will be the decisive consideration. In arriving at my finding as to credibility, I did not rely solely on demeanour for that has to be balanced against the rest of the evidence and the probabilities of the case.

It may be well to also remember what was said by Lord Wright and often quoted from his judgment in *Powell & Wife* v. *Streatham Manor Nursing Home,*[1] of the possibility of judges being deceived by adroit or plausible knaves or by apparent innocence. Much to the same effect,

though in more illustrative terms, is what Lord Devlin, quoting from MacKenna J. said in his book "The Judge" (1969) at page 63 and which I now reproduce:

"The great virtue of the English trial is usually said to be the opportunity it gives to the judge to tell from the demeanour of the witness whether or not he is telling the truth. I think that this is over-rated. ... I would adopt in their entirety (this being the highest form of judicial concurrence) the words of Mr. Justice MacKenna: 'I question whether the respect given to our findings of fact based on the demeanour of the witness is always deserved. I doubt my own ability and sometimes that of other judges, to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help."

With Lord Wright's and Lord Devlin's warnings in mind, I would turn to consider the particular circumstances of this case.

The plaintiff, Mr. Tan Cheng Hock ("Mr. Tan" for short) is a recently retired businessman aged 76 but, at all material times to this suit, he dealt in refrigerators and carried on a Cold Storage business under the name or style of "Union Cold Room" at premises known as No. 422, Penang Road.

The first defendant, Mr. Chan Thean Soo ("Mr. Chan" for short) is a security officer at Bayan Lepas, aged 62 years, but at all material times to this suit, he was a clerk attached to the Vehicle Department of the Municipality, Penang, and in receipt of a salary of $193 per month.

The second defendant ("Mrs. Chan" for short) is the wife of Mr. Chan and also a niece of Mr. Tan. She is a housewife and, during her younger days, stayed under the same roof as Mr. Tan; in fact, they stayed in the house of Mr. Tan's younger brother.

I have said that the parties were on very close terms; two examples will illustrate this. Mr. Chan used to borrow Mr. Tan's pick-up van during weekends and holidays to hunt game. They also shared the kill. As regards Mrs. Chan, whenever she visited Mr. Tan, he would, at the end of each visit, take the trouble to drive her home in his car. Such then was the relationship of the parties before they fell apart.

In order to elucidate the issues, I shall first of all state the facts about which there was no dispute.

Some time in July 1955, Mr. Chan formally applied in writing to the Municipality, Penang, for allocation of a dwelling house in a building scheme known as Pinhorn Estate, Penang, set up by the Municipality for the primary purpose of benefiting its employees. However, it was also open to members of the public to buy these houses but preference was given to staff of the Municipality, nor, for that matter, was any restriction imposed against resale. So, any buyer was free to resell the house he had purchased at any time.

In the event, Mr. Chan was successful in his application and, although he had mentioned in his formal application for allocation, that he proposed to pay for the dwelling house by instalments, he in fact did so by a single lump sum payment of $9,900 by a cheque drawn by Mr. Tan, made out in favour of Mr. Chan and Mrs. Chan, though it was not crossed. The conveyance, which was executed on May 21, 1956, was duly registered on July 19, 1956, and, soon afterwards, both Mr. and Mrs. Chan moved into the disputed property and there they remain to the present day.

Curiously, however, the title deed (Ex. P.3) to the disputed property was handed over by Mr. Chan to Mr. Tan though several months after the purchase and remained with the latter until its production in Court.

But, Mr. Tan received no rent from Mr. Chan and Mrs. Chan who, however, paid the rates and the outgoings. So much for the facts which do not appear to be in dispute.

I now turn to consider the crucial question in this case, about which there is an acute conflict of evidence, namely: why did Mr. Tan issue the cheque for $9,900 in favour of Mr. Chan and Mrs. Chan?

According to Mr. Tan, some time in May 1956, Mr. Chan called on him at his office. Mr. Chan said that he had booked the disputed property in Pinhorn Estate but had no money to pay for it; so he suggested that Mr. Tan buy it instead. Mr. Tan agreed. Mr. Chan then asked that he and Mrs. Chan be allowed to stay in it rent free, but only temporarily, and subject of course, to their paying the usual rates. Mr. Tan agreed to this

proposal but made it clear that the conveyance would have to be made out in his own name. This was, of course, acceptable to Mr. Chan and Mrs. Chan.

So, pursuant to this arrangement, Mr. Tan issued the cheque to Mr. Chan who then presented it to the Municipality for purchase of the disputed property. The conveyance was, as I have said, duly executed and registered on July 19, 1956.

However, Mr. Chan who had by now been in occupation for several months, did not come back to the plaintiff with the title deed. Instead, on October 25, 1956, a contractor named Cheah Choo Kheng (P.W.5), saw Mr. Tan with a bill (Ex. P.2) for repairs and other work done by him to the disputed property. Cheah, who was called by Mr. Tan, testified that Mr. Chan had instructed him to look to Mr. Tan for payment of the bill for $680. Mr. Tan paid the bill, because, as he put it, "I was not surprised by this request as Mr. Chan told the contractor that the house belonged to me."

It then struck Mr. Tan to look up Mr. Chan; so, on the next day, he called at the disputed property where he met both Mr. and Mrs. Chan and produced the bill. They confirmed that the repairs had been done, the fencing at the front and the back and the iron gate installed, and a dog kennel and a chicken coop constructed.

The words "54 Hargreaves Circus, Penang," appearing on P.2 were, said Mr. Tan, not written by him but presumably by the contractor's clerk.

Be that as it may, Mr. Tan then took the opportunity of asking Mr. Chan and Mrs. Chan for the title deed to the disputed property. Mr. Chan, therefore, handed this to Mr. Tan, who, on perusing it, found to his dismay, that instead of his own name, that of Mr. Chan and Mrs. Chan appeared therein as the registered owners. Mr. Tan being taken aback, queried Mr. Chan and Mrs. Chan regarding this. Mr. Chan's reply was that the disputed property was meant only for staff of the Municipality, and that the conveyance in favour of Mr. Tan could only be executed after the expiry of three years from the date of original purchase.

On hearing this, Mr. Tan asked for and received from Mr. Chan, the title deed, receipts for payment of the purchase price, solicitors' fees and disbursements.

So, Mr. Tan waited for the three years to pass after which he once again called upon Mr. and Mrs. Chan at the disputed property to get a date for execution of the conveyance but, they put him off with various excuses. Eventually — some time in 1963 — Mr. Chan and Mrs. Chan, without mincing words, flatly told Mr. Tan that they were not going to transfer the disputed property to him and, also, that he should stop visiting them.

In spite of this, Mr. Tan attempted a compromise; for example, he sent by ordinary post, two type written notes, typed by his clerk, to Mr. Chan dated January 17, 1963, and March 18, 1967, respectively, being Exhibits P.4 and P.5.

They merit reproduction in full and were in the following terms:

Ex. P.4

17/1/63

"Please note that this is the last request for you to go to M/s. Lim, Lim & Oon. It is your idea that I bought the house because you have no money to do so. If you find the house cheap, I will be willing to sell you at cost of $10,400 losing interest for nearly 10 years which will come to about $10,000. Note that I have not promised to give anything or the house from the beginning up to this present moment.

Sd. T.C. Hock.

Ex. P.5

Mr. Chan Thean Soo

Cost of House	9,900-00
Cost of Fencing	576-00
Cost of Lawyer	500-00
Interest for 10 years @ 8% Bank rate the lowest	8,400-00
	$19,370-00

It is for that you pay $12,000 for the house or I compensate you $2,000 for your transfer. If you want to discuss, see me at office daily from 12 to 4 p.m.

Sd. T.C. Hock.
18/3/1967."

According to Mr. Tan, to both these notes, he received no reply.

Although cross-examination of Mr. Tan, as regards this part of the case, was aimed at showing that the notes were a fabrication, invented for purposes of the trial, and were never really sent

to Mr. Chan, it was clear from the latter's own admission, in the witness box, that he did receive either the original or copies thereof and that he had handed them over to his solicitor soon afterwards. He further confirmed that he received them on the dates they bear. He claimed that he told his solicitor, Mr. Jagjit Singh, about this. I am afraid I cannot accept this, because, if that were so, counsel would hardly have cross-examined along the lines I have just mentioned. Be that as it may, as I have said, there was no reply to either note.

Mr. Tan was cross-examined heavily as to why he made no enquiries at the Municipality before issuing his cheque. In reply, Mr. Tan said he trusted Mr. Chan implicitly. He added that when Mr. Chan arrived at his office, on the date concerned, he was busy in conference with his cold room manager, one Khaw Thuan Tan (P.W.6). He further confirmed that had Mr. Chan not seen him, he would not have been interested in buying the disputed property because he did not even know where it was located.

Mr. Tan also admitted that in submitting his balance sheet to the Department of Inland Revenue, for tax purposes, he did not declare the disputed property as an asset because it was not registered in his name.

Mr. Tan confirmed that it was not until December 21, 1966, that he sent a formal demand in writing through his solicitors, M/s Lim, Lim & Oon to Mr. and Mrs. Chan, calling upon them to effect the transfer of the disputed property. He said that he had waited for ten years before resorting to such action because Mr. Chan and Mrs. Chan kept putting him of; besides, it was not until 1963, that they told him, in so many words, that he could do what he liked, for they would not transfer the disputed property to him.

He was then cross-examined as to why he had delayed two more years before instructing his solicitors to send the formal demand in writing to which he replied that he had in fact instructed his solicitors in 1964. The member of the firm of M/s Lim, Lim & Oon who he then instructed was one Mr. C.O. Lim, since deceased.

It was also put to Mr. Tan, in cross-examination, that Mr. and Mrs. Chan never instructed the contractor, Cheah, to look to Mr. Tan for payment of the bill. This, Mr. Tan denied.

It was further put to Mr. Tan that the bill had been invented for purposes of this case. However, Mr. Tan denied this allegation as well and maintained that his version represented the truth.

Mr. Tan was then cross-examined as to why Mr. Chan should, in the first place, have approached him to buy the disputed property to which he replied that Mrs. Chan was his niece. She was very close to him. When she was young, she had lived under the same roof with him. He did not know that Mr. Chan could have obtained a loan to buy the house.

Mr. Tan was next cross-examined as to whether he knew that for a transfer to be registered in the purchaser's name, the purchaser would first have to sign it. He said that he did not know this. He admitted however that in 1951 he had purchased a Lot on which he had built a house – No. 18 Chor Sing Lee Road, Penang. This transfer which he signed was registered in his name. He explained that, when he gave the cheque to Mr. Chan, he totally forgot about the matter as he trusted him and decided to "let him do all the necessary."

It was next put to Mr. Tan, in cross-examination, that Mr. Chan gave him the title deed because he had persuaded Mr. and Mrs. Chan that it would be safer to let him keep it since they had no safe. But, Mr. Tan denied this.

It was also suggested that Mr. Chan agreed with this advice because Mr. Tan was an elder member of the family. However, Mr. Tan said there was no such thing as he being the elder member of the family.

He was next asked why he allowed Mr. and Mrs. Chan to stay rent free, to which Mr. Tan replied, Mrs. Chan was his niece, repeating, "We used to stay together in our younger days."

Mr. Tan called as his first witness, one Ong Cheng Seng, (P.W.2) an Assistant Director attached to the Penang City Council (the successor of the Muncipality, Penang). This witness had with him the City Council file in respect of the disputed property and, after consulting it, confirmed that Mr. Chan had submitted a formal application in writing, being Ex. P.9, dated for booking a dwelling house. He confirmed that Mr. Chan had made payment in full of the purchase price by cheque on May 15, 1956. He further confirmed that Mr. Chan was eligible for a loan from the Malaysia

Borneo Building Society to purchase a dwelling house since the City Council would have stood as guarantor.

He next confirmed that Mr. Chan was notified in writing by the Municipality of the offer of the dwelling house and this was open for acceptance until July 28, 1955.

The witness then mentioned, the significant fact, that when Mr. Chan applied, he said in his application form, that he required a loan to effect the purchase and proposed repayment by monthly instalments of $73.00, each spread over a period of 21 years. However, this statement in the application form, was later deleted and substituted by the words "pay cash." The disputed property was, he said, a single storey corner dwelling house.

He further confirmed that Municipality houses were open to all to purchase, Municipality employees and members of the public alike – but the former were given preference. Nor, was there any restriction against resale at any time.

The next witness called by Mr. Tan was Mr. Sivanandan (P.W.3), Advocate & Solicitor of M/s. Presgrave & Matthews, who confirmed that his firm had prepared the conveyance of the disputed property. The member of the firm who was in charge of the matter was one Mr. Ross whose whereabouts were unknown. He confirmed that the usual scale fees for the preparation of the conveyance were charged and also that reimbursement for disimbursement had been paid. The receipts for these he identified as P.7 and P.8 respectively.

The next witness for Mr. Tan was one Miss Rose Goh (P.W. 4), an Officer of the Hongkong & Shanghai Bank, who gave formal evidence. She confirmed that the cheque concerned was drawn on her bank by the plaintiff and was duly paid but destroyed as this was in accordance with banking practice to retain paid cheques for a period of seven years only. She also said that immediately after this payment, Mr. Tan still had a credit balance of $40,682.65 in his account. She identified the relevant bank statement showing this as Ex. P.11.

The fifth witness for the plaintiff was the contractor, Cheah (P.W.5). He said that he carried out certain works on the disputed property which I have already described. This, he did, on the request of Mr. Chan. Cheah added that the disputed property was situated in Greenlane, Penang, and that he duly presented the bill to Mr. Tan for payment. He did so, on the instructions of Mr. Chan, who said that it was Mr. Tan's house.

The witness added that the bill was written out entirely by him except as to the words in English, "54 Hargreaves Circus, Penang." He said that these words, which were on the bill before he took it to Mr. Tan, were written by his clerk. However, his clerk was no more in his employ and he did not know where he was.

Under cross-examination, the witness said he first got to know Mr. Chan when he went to the Municipality to pay his license fees for storage of gas. It was Mr. Chan who received these fees.

It was put to him that Mr. Chan never asked him to carry out any work but he denied this.

The witness further said that before he carried out the works, he verified Mr. Chan's request by speaking to Mr. Tan. He also said that the client's address, appearing in the bill was "54 Greenlane" since in Chinese, "Hargreaves Circus area" is known as "Greenlane."

It was next put to the witness that the bill did not relate to works done on the disputed property; in other words, that it was a fabrication, but the witness disagreed.

He then said he knew how to get to the disputed property. It was lastly put to him that Mr. Chan never directed him to carry out the works but the witness denied this.

With a view to verifying the witness's evidence, I invited him to show the way to the disputed property but he was unable to do so. However, I did not regard this as of great significance because it was quite obvious that the witness looked very frail and did not appear at all well. As a matter of fact, he appeared in Court in a wheel chair and although he gave evidence from the witness box, he did so while seated throughout.

The sixth witness for Mr. Tan was Khaw Thuan Tan, aged 78 years. He had previously been employed by Mr. Tan as a cold room manager. He said he knew Mr. and Mrs. Chan, being relatives of Mr. Tan, who used to call on Mr. Tan at his premises.

Casting his mind back, he said he recalled Mr. Chan borrowing Mr. Tan's pick-up van for hunting wild boar and storing their carcasses in the cold

room. More importantly, he confirmed that he saw Mr. Tan hand the cheque concerned to Mr. Chan. He could not, however, say for what sum this cheque was. At first, he said that as Mr. Tan handed the cheque to Mr. Chan, he (Mr. Tan) told him that it was for buying a house. Later, the witness said that Mr. Tan told him this only after Mr. Chan had left the office.

However, it seemed to me, from the way he gave his evidence that this apparent discrepancy was due to an inability to recall due to the very considerable period of time which had elapsed since the incident.

Even more important was the witness's evidence, that he did not see Mr. Chan hand over any money to Mr. Tan as was alleged by the Defence.

He said that when Mr. Chan arrived that day, he was engaged in conversation with Mr. Tan about business matters. He maintained that if Mr. Chan had handed over the money to Mr. Tan in exchange for the cheque, he would have noticed this, because at that time, he was just sitting at the same table observing them. They were together for about 10 to 20 minutes and he did not lose sight of them during that time nor did he leave the room. He accepted, that probably, while Mr. Tan and Mr. Chan were engaged in conversation, he was occupied at his table doing calculations but he maintained that it was still not possible for Mr. Chan to have passed the $9,900 to Mr. Tan in exchange for the cheque without attracting his attention because he was then facing Mr. Tan.

In answer to the Court, he confirmed that he attended the trial to give evidence, not in response to a subpoena, but as a result of a letter from Mr. Tan's solicitors. He received the letter some time last year. However, he conceded that it was possible that he was interviewed by Mr. Tan's solicitors on December 6, 1979.

The next witness for Mr. Tan was one Quah Han Nyhu (P.W.7). He was a colleague of Mr. Chan since 1955, being an employee of the Municipality, Penang. Like Mr. Chan, he too was successful in applying for the purchase of a dwelling house. He also identified Mr. and Mrs. Chan to the solicitor who prepared the conveyance in respect of the disputed property. He said that his house was of the same type as the disputed property but was not in the same block of houses. He confirmed that all houses in the scheme had no fence but only a front gate. Subsequently, the purchasers put up their own fences.

Under cross-examination, he said that there was a chain link fence running all along the back of the houses and also that there were fences separating the houses. He did not think there was a chain link fence at the front of the houses when they were first bought.

Mr. Peter Oon (P.W.8), Advocate & Solicitor of M/s. Lim, Lim & Oon, was Mr. Tan's next witness. He confirmed that the letter before action (p. 31 AB) – was sent out by his firm and that there was a reply thereto (p. 32 AB). He recalled that the plaintiff had instructed the late Mr. C.O. Lim of his firm to send the letter. Mr. Lim was then an associate of the firm of M/s. Lim & Oon and had his own office at Kota Bharu which he attended once a month or once a week. Mr. Lim had died in 1971.

Mr. Peter Oon explained that the letter before action was prepared by him either on the instructions of Mr. Tan or Mr. C.O. Lim. Mr. Tan, he said, was a friend of his uncle and used to come to the premises of the firm quite often in 1964 to 1965.

That was the sum of the evidence called for Mr. Tan.

I now turn to consider the case for the defence.

Mr. Chan, by way of introduction, mentioned that he was 62 years old, a security officer in Mostek in Bayan Lepas and that he had *retired* as a Municipal employee, Penang, in 1970. The relevance of his remark that he had *retired* will become apparent later when I assess his credibility.

He said he bought the disputed property and paid the purchase price of $9,900 by a cheque drawn by Mr. Tan and made out in favour of himself and his wife. However, he had given Mr. Tan a sum of $9,900 in cash, in exchange for this cheque.

Going back a little, he recalled how on May 14, 1956, in the evening, Mr. Tan had visited him at home at No. 68 C Mukim 18 Tanjong Tokong Road, Penang. There, they conversed about Mr. Chan having booked a Council house. Mr. Tan then advised Mr. Chan to hand over to him the cash intended for the purchase of the house and, in return, he would give Mr. Tan a cheque for an equivalent sum. Why Mr. Chan should have told Mr. Tan he kept such a large sum of money at home

was never satisfactorily explained. Be that as it may, it was then said that Mr. Tan urged that he was an elderly man – an uncle to Mrs. Chan – and suggested that Mr. Chan hand over the cash to him at his business premises at 509, Penang Road at 8.30 a.m. the following day. Also present at this discussion was Mrs. Chan. Without further ado, Mr. and Mrs. Chan agreed to this proposal – or, at least, so it was said.

Mr. Chan then explained how he came to have a sum of $9,900 in cash. Of this sum, $6,000 was his and $3,000 was his wife's. He had borrowed another $1,000 from his brother. Although he had no bank account, his wife had a savings account in the Post Office. Neither he nor his wife had any fixed deposit account.

In answer to questions by the Court, Mr. Chan said that he and his wife kept their money in a cabinet at home underneath some clothing.

Questioned further by the Court, as to why he did not place his money on fixed deposit or in the Post Office, Mr. Tan evaded the issue and, instead, explained how the $9,900 was raised. He said that his wife raised the $3,000 by sale of jewellery some time in May 1956 to some friends. Mr. Chan himself said that he raised the $6,000 by selling his share in a dwelling house No. 125 Happy Valley, Paya Terubong. This was in 1952. He claimed that he sold his share to his sister who was in the United States of America. He did not know if his interest in this house was registered. His sister paid him $6,000 "by instalments, at times $200 and so forth for a period of four years." No documentation of any kind was produced to support these facts nor was any explanation vouchsafed for their non-production.

Mr. Chan then resumed his narrative of events and said that he kept the appointment with Mr. Tan at the Union Company premises on May 15, 1956 at 8.00 a.m., obligingly bringing along with him the $9,900 in cash, wrapped in a newspaper. He exchanged this cash with Mr. Tan for a cheque for the equivalent sum which the latter drew on his bank account. He added that no one else was present. He then proceeded directly to the Municipality, and handed over the cheque, having endorsed it previously on the reverse. He was duly issued a receipt (P.6). Later, he paid to M/s Presgrave & Mathews a sum of $2,055.50, being the conveyancing charges for which he was issued a receipt. He also reimbursed his solicitors for the registration and stamp fees and was issued another receipt for this.

Some time in July 1956, he and his wife moved into the disputed property. When he did so, he had a chain link fence and two iron gates installed; one in front and the other behind. He affirmed that he had never seen the contractor Cheah before. More importantly, he affirmed that there was no truth in Mr. Tan's allegations that he was given a cheque to purchase the house for Mr. Tan. He said, that if he wanted to, he could have obtained a loan to purchase the disputed property. That, of course, would have entailed payment of interest. In any event, why speak about a loan if he had the cash? He maintained, that at no time, did Mr. Tan query him as to why the house was registered in the joint names of himself and his wife instead of Mr. Tan.

He confirmed that he had paid all rates on the disputed property.

Under cross-examination by counsel for Mr. Tan, he at first said he never received the two typewritten notes (Exbs. P.4 & P.5) from the plaintiff calling for a compromise but, later, he admitted that he did so, about the time of the dates appearing therein. He also admitted that he had then passed them over to his solicitors.

As I have said, when questioned by the Court, he said that he told his counsel, Mr. Jagjit Singh, that he had received the original notes. He maintained that he had never instructed Mr. Jagjit Singh to put to Mr. Tan that the notes were forgeries. Yet, counsel had done so. Later, Mr. Chan said he could not recall if he had handed the original notes to his lawyer, Mr. Jagjit Singh.

He was then reminded that he had been ordered by the Court to supply copies of the notes to Mr. Tan and his attention drawn to pages 17 and 18 of the Bundle of Documents, but he said that he did not know about this. It was then put to him that he had the notes but had refused to produce them. In reply, he said that they might have got mixed up in his file along with other letters.

He then admitted, contrary to what he had said earlier, that he had not retired from the Municipality but had in fact been dismissed. This was because he had misappropriated Municipality funds. He claimed that he was implicated because he tried to help his assistant. This is how he put it:

"My assistant had made use of the Municipal money and I tried to help and I was also involved." A copy of the relevant charge sheet, (Ex. P.17) was shown to Mr. Chan. He then confirmed that he had pleaded guilty to the charge and had been convicted and sentenced to imprisonment for one week and fined $1,000. However, on appeal by him, the fine was set aside.

I wish to make it clear, however, that in assessing Mr. Chan's credibility, I totally disregarded his conviction. Nevertheless, I think, I was entitled to take into consideration, the fact that in examination-in-chief, Mr. Chan had said that he had *retired* from the Municipality whereas in fact he had been dismissed. This, to my mind, was evidence showing that Mr. Chan was hardly a model of candour. In other words, it was a matter which I was entitled to make into account in evaluating his credibility; but, I repeat, the conviction is something which I have totally disregarded as being irrelevant to the issues raised in this suit.

Mr. Chan was then cross-examined regarding his resources in 1955. At first, he said that he could not recall the amount of salary he was receiving. But, later, when he was confronted with Ex. P.9, paragraphs 11 and 12 of which contained his conditions of service, he had to admit that he was in receipt of a salary of $223 per month, but, after certain deductions, he was left only with a trifling sum of $173 per month.

He claimed, however, that he had other sources of income; for example, he had sublet two rooms and received $60 per month. He also said that he received about $200 per month from the sale of wild boar meat. His wife and two children occupied a room and he spent $120 per month to feed four mouths. He confirmed that he had a motorbike which he bought with the help of a loan from the Municipal Council. He repaid the loan by monthly instalments which were deducted from his salary.

When it was put to him in cross-examination that on his income from the Municipality alone, he could not possibly have afforded to buy the disputed property, he agreed. However, he explained that for three years, from 1948 to 1950, he had been a Settlement Officer, drawing a salary of $450 per month. He was supplied free food as he ate in Army Camps and travelled on warrant tickets. He was thus able to save almost his entire salary which he gave to his mother. He was then a bachelor. He got married in 1951 and stayed with his sister and mother but, as they could not agree with his wife, he and his wife moved out. This was also in 1951.

Earlier, in 1949 or 1950, his parents, his sister and he himself had pooled their resources and bought a dwelling house No. 125 Happy Valley. As his father was entrusted with the task of making this purchase, he would have this Court believe that *he did not know in whose name this dwelling house was registered nor did he know how much was paid for it. He thought that this dwelling house was still with the family.* I am afraid I find these parts of his testimony inherently incredible and therefore totally unacceptable.

Counsel for Mr. Tan then cross-examined Mr. Chan with a view to showing that it would have been just as convenient and safe for Mr. Chan to have taken the $9,900 in cash from his house at 68, Happy Valley, to the Municipality at the Esplanade, as it would have been to take it to Mr. Tan's office at Penang Road, for purposes of exchanging it for a cheque. However, Mr. Chan did not agree. It was next put to Mr. Chan that it was beyond his means to have possessed a sum of $9,900 at that time and that, in any case, if he had as much money as that, he would not have kept it at home. However, Mr. Chan denied these suggestions and, I would remark, that he appeared conspicuously embarrassed as he did so.

He also denied that he kept wild boar carcasses in Mr. Tan's cold room though he admitted that he did borrow Mr. Tan's pick-up van for hunting game.

Mrs. Chan also gave evidence corroborating Mr. Chan as regards Mr. Tan's visit to their home where it was alleged that Mr. Tan advised them to exchange the sum of $9,900 for his cheque, for reasons of safety. She was, of course, not able to testify regarding the events in Mr. Tan's office at the time Mr. Chan received the cheque from Mr. Tan since she was not there.

Mrs. Chan did not impress me as a witness of truth. She gave, in parrot fashion, an account of Mr. Chan's resources. Her testimony as to this was, so it seemed to me, tailored to match, in every detail, the version given by Mr. Chan.

At the end of the day, there were two cogent facts which, I regret to say, Mr. and Mrs. Chan never satisfactorily explained. They were, first, the admitted fact that the disputed property was pur-

chased with a cheque drawn by Mr. Tan and secondly, the admitted fact that the title deed to the disputed property, along with the connected documents, had all along been in the possession of Mr. Tan. I cannot accept the perfectly ridiculous explanation given by Mr. Chan, as to how he came to have the $9,900 in cash, at home, underneath some clothing in a cabinet, when he simply did not have the resources to possess such a sum.

Mr. Chan was, at the material time, very far from being naive. In fact, he was a mature and educated man. He struck me in the witness box, as intelligent and mentally alert.

I do not think that he could have been so easily tricked by Mr. Tan into parting with a sum of $9,900, which for him, particularly in those days, must have been a very substantial sum of money, in exchange for a cheque for the reasons alleged.

Again, Mrs. Chan had a savings account in the Post Office, and, I think, that if Mr. Chan had such a substantial sum, he would surely have kept it there or, alternatively, have placed it on fixed deposit in his own name, but certainly not underneath some clothing in a cabinet at home.

It will be recalled that when Mr. Chan applied for allocation of a house through the Municipality, he said, in no uncertain terms, that he would require a loan for the purchase repayable by instalments of $173 per month, over a period of 21 years. This statement is hardly consistent with the assertion made by Mr. and Mrs. Chan that they had, at that time, at home, a sum of $9,900 in cash. It is more consistent with Mr. Tan's version that Mr. Chan, having no money to purchase the disputed property, had invited Mr. Tan to do so, subject to being allowed to stay in it, temporarily and rent free but for payment of rates.

Then, again, Mr. Chan turned out worse than a broken reed when he said that he left the title deed with Mr. Tan for safe keeping. If he had thought it safe enough to keep the $9,900 in cash under some clothing in a cabinet at home, then why not do the same with the title deed? After all, a lost title deed can always be replaced but not cash.

On the other hand, I found Mr. Tan's version that it was he who was tricked into parting with the cheque because he trusted Mr. and Mrs. Chan, who were close to him, as entirely probable, and I believed it. For the same reason, I accepted his explanation as to why he purchased the disputed property without having had a sight of it beforehand.

I wish to take this opportunity to repeat that when Mr. Chan was cross-examined about the two notes dated January 17, 1963, and March 18, 1967 (Ex. P.4 and P.5), calling for a compromise, he initially said he could not recall if he had seen those notes. Then, he shifted his ground and said that he had received the notes on the date they bear and had given them to his solicitors. Later, he said he could not recall that he had done so and that they might have got mixed up in his file amongst his papers.

It will be recalled that in cross-examination of Mr. Tan, the line taken was that these notes were a complete fabrication and an invention made up for purposes of this case. But Mr. Chan denied that he had instructed his counsel to this effect. I am satisfied he was lying on this point. I do not believe that experienced counsel would have so cross-examined in the absence of specific instructions to that effect.

It was also clear, on Mr. Chan's own admission, that these notes were genuine and that neither of them evoked a reply from him although they cried out for one.

I therefore asked myself the question whether I should draw an adverse inference against Mr. Chan, from his failure to reply.

In *Wiedemann* v. *Walpole*,[2] an action for breach of promise of marriage, it was held, that the mere fact that the defendant did not answer letters written to him by the plaintiff in which she stated that he had promised to marry her, was no evidence corroborating the plaintiff's testimony in support of such promise.

Lord Esher M.R., in his judgment, remarked, "Here, we have only to see whether *the mere fact* of not answering the letters, *with nothing else* for us to consider is any evidence in corroboration of the promise." (Emphasis added). Earlier, in his judgment, he said, "Now there are cases – business and mercantile cases in which the Courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree."

In this case, having regard to the shifting stances adopted by Mr. Chan when cross-examined about the two notes, I did at one stage think that perhaps his silence upon receipt of those notes might be construed as an admission of their contents. However, at the end of the day, I considered that to be fair to him, I should not so construe his silence. Accordingly, I did not treat his silence as an admission of the contents of the notes.

In these circumstances, I have no hesitation in accepting Mr. Tan's version on what I described as the crucial question in this case, namely, why did he hand the cheque for $9,900 to Mr. Chan?

But, *ex abundanti cautela,* I might as well state my findings as to the credibility of the contractor, Cheah, and the cold room manager, Khaw, respectively. I cannot see what possible reason either of these witnesses could have had for coming to Court and committing deliberate perjury to assist Mr. Tan. No reason was suggested to them in cross-examination for having done so. I was not surprised about this for, it appeared to me, that there were none. I also saw nothing improbable in their testimony. Accordingly, I had no hesitation in accepting them as witnesses of truth.

I wish to make it clear, however, that even without their testimony, I would have been prepared to accept Mr. Tan's version of the fact as sufficiently cogent to entitle him to judgment. Of course, with their testimony, the case for Mr. Tan became even stronger for reasons which are self-evident.

In the result, I had no hesitation in holding that Mr. Tan was entitled to the declarations prayed for in the Statement of Claim, with the usual consequential orders and the costs of the action. The Counterclaim was, in consequence, dismissed.

Order accordingly.

Solicitors: *Darshan Singh & Co., and Jag-Jit Singh & Co.*

RE HAJI YAHYA LAMPANG,

EX PARTE SABAH DEVELOPMENT BANK BHD.

[O.C.J. (Abu Mansor J.) June 30, 1986]

[Kota Kinabalu – Bankruptcy Petition No. 60 of 1985; Bankruptcy Notice No. 215 of 1985]

Bankruptcy – Notice – Validity of – Creditor's petition – Unsealed copy served on judgment debtor – Whether valid – Application to set aside default judgment – Petition disputed – Whether receiving order ought to be granted – Bankruptcy Act, 1969, ss. 3(1)(i) & (2), 6(4) & 131 – Bankruptcy Rules, 1969, rr. 102, 109, 117, 274 & 276 – R.H.C. 1980, O. 41, r.8 – Banking Act 1973, ss. 2 & 3 – Finance Companies Act 1969, ss. 2 & 3 – Courts of Judicature Act, 1964, ss. 7, 11 & 24.

These proceedings arose out of a guarantee executed by the judgment debtor in favour of Sabah Development Bank, who had obtained a default judgment against him. On April 19, 1985, the Bank presented a creditor's petition against him for failing to comply with the requirement of a bankruptcy notice served on him on April 9, 1985. The judgment debtor opposed the granting of a receiving order and applied to dispute the petition on several main grounds, *i.e.* (a) failure to serve a sealed copy of the petition on the judgment debtor; (b) the validity of the petition is being disputed under rule 117 of the Bankruptcy Rules, 1969; (c) the affidavit of truth annexed to the petition is not sufficient as it was sworn before an advocate of the same firm representing the petitioner; (d) the judgment debtor has applied to set aside the default judgment, and be given leave to defend, and execution be stayed, and (e) there were triable issues. The Bank opposed the judgment debtor's application.

Held: (1) the unsealed creditor's petition could not reasonably mislead the judgment debtor and therefore it was validated by section 131 of the Bankruptcy Act;

(2) the petitioning creditor was authorized to give a loan for which the judgment debtor was the guarantor;

(3) in bankruptcy matters the attestation need only comply with the Bankruptcy Rule 102 and need not comply with O.41, r.8 of the Rules of the High Court, 1980;

(4) under proviso (ii) of section 3(2) of the Bankruptcy Act, the bankruptcy notice was valid as the judgment debtor had not given notice disputing its validity;

(5) the court did not feel disposed to enquire into the default judgment;

(6) being bound by the *Tractors Malaysia*[22] case, the learned judge made the receiving order against the judgment debtor as prayed. Petition granted, with liberty to apply.

Cases referred to:

(1) *Re M.P.L.M. Muthiah Chettiar* [1938] M.L.J. 233.

(2) *Au Yong* v. *Dicum & Anor.* [1963] M.L.J. 349, 354.

(3) *Re A Debtor, No. 21 of 1950, Ex Parte The Debtor* v. *Bowmaker* [1951] 1 Ch. 313.